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In the Supreme Court of the United States

October Term, 1963

No. 547

GERALD L. RATIGAN, et al.,

Appellants,

vs.

HERBERT DAVIS, et al.,

Appellees.

On Appeal from the Supreme Court of the State of Nebraska

MOTION OF APPELLEES HERBERT DAVIS, HARRY D. BARBER, FRANK FOGARTY, SAMUEL GREENBERG, HENRY C. KARPF, PETER KIEWIT, RALPH KIPLINGER, MRS. JOHN MERRIAM AND VARRO RHOADES, TO DISMISS APPEAL OR IN THE ALTERNATIVE, TO AFFIRM JUDGMENT.

William R. King,
620 First National Bank Bldg.
Omaha 2, Nebraska

Seymour L. Smith,
720 Keeline Bldg.
Omaha 2, Nebraska

Members of the Bar of the Supreme Court of the United States.

Counsel for named Appellees.

Cockle Printing Company—Law Briefs—Omaha, Nebr.

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MOTION TO DISMISS APPEAL, OR IN THE ALTERNATIVE, TO AFFIRM

Appellees, Herbert Davis, Harry D. Barber, Frank Fogarty, Samuel Greenberg, Henry C. Karpf, Peter Kiewit, Ralph Kiplinger, Mrs. John Merriam and Varro Rhoades (sometimes referred to hereinafter as "named appellees"), members of the Board of Regents of the Municipal University of Omaha and only defendants now

involved as appellees, except defendant Howell (see appellants' Jurisdictional Statement, to p. 4), pursuant to Rule 16 of the Revised Rules of this Court, respectfully move the Court to dismiss the appeal; or in the alternative, these appellees respectfully move the Court to affirm the judgment below, all on the ground that no substantial Federal question is presented by the appeal.

———o———

STATEMENT OF APPELLEES

Correcting Omissions and Inaccuracies in the Statement of Appellants.

I. The petition in the District Court of Douglas County (R. 3) does not allege as stated (Jurisdictional Statement top p. 6) that Sec. 14-1317 R. R. S. Nebr. 1943, is unconstitutional under the provisions of the Fourteenth Amendment. It merely alleges that the *assessment and collection of the taxes* are unconstitutional. (See post, page 4.)

II. Appellants fail to mention that the voters of Omaha did, at a special election held in 1951, pursuant to statutory authority (Sec. 14-1317 R. S. Neb., 1943, Reissue 1962, shown in Appendix A, post, page 10), authorize the tax of two mills for the support of the University, complained of by appellants. (Exhibit—Certificate, Appendix B, post, page 13.) Although appellants' property had not been annexed to the City of Omaha and they were not voters therein at that time, nevertheless, as pointed out in the Argument (post, page 5), such property is legally taxable for the purpose.

III. The Board of Regents of the University does not "levy and collect" any taxes as asserted by appellants (Jurisdictional Statement, top page 8) because,

(a) They merely certify the amount to be levied for the purposes of such University to the City Council of the City. The amount so certified cannot exceed the amount previously authorized by the voters of the City. The City Council "levies" the tax (Sec. 14-1317, *supra*).

(b) The taxes in question are collected by the Treasurer of the City as are other taxes, and paid over by him to the Treasurer of such Board of Regents, subject to the order of said Board of Regents (Section 14-1317, *supra*).

IV. Appellants are not disenfranchised because,

(a) The appellants, as voters of the City, are permitted to vote for candidates for the City Council (Section 14-201, R. S. of Neb., 1943, Reissue 1962, shown in Appendix C, post, page 15).

(b) The County Treasurer of Douglas County, Nebraska, the county in which the metropolitan City of Omaha is located, is ex officio Treasurer of such city (Section 14-551, R. S. of Neb., 1943, Reissue 1962, shown in Appendix D, post, page 15).

(c) The County Treasurer of Douglas County, Nebraska is ex officio Treasurer of the Board of Regents (Section 14-1318, R. S. of Neb., 1943, Reissue 1962, shown in Appendix E, post, page 15).

(d) The appellants are permitted to vote for candidates for the office of Treasurer of such county, it being

an elective office (Section 32-308, R. S. of Neb., 1943, Reissue 1960, shown in Appendix F, post, page 16).

V. Appellants are represented in the Legislature of Nebraska which enacted the pertinent statutes referred to ante.

VI. Appellants, residents of Omaha, enjoy the same benefits flowing from the Municipal University that other residents of the City of Omaha enjoy (Sec. 14-1308, Rev. Stats. Nebr. 1943, Reissue 1962, Appendix G, post page 17).

VII. Appellants do not show that they ever objected to the levy of the tax before the City Council, the levying body for whose members they are privileged to vote.

ARGUMENT

Appellants have no remedy by Appeal.

No claim is made by appellants that there is drawn in question any treaty or statute of the United States, or decision against its validity; or that there is drawn in question the validity of a statute of any state on the ground of being repugnant to the Constitution, treaties or laws of the United States, and the decision in favor of validity.

The only question under the Federal Constitution purportedly raised by appellants is found in Paragraph VIII of their petition in the State District Court (R. 3). It is that the "assessment of the taxes" and the "attempted collection" of same are void as in conflict with the Fourteenth Amendment. No other alleged ground is anywhere asserted, except that in the prayer of their petition appellants attack the constitutionality of Sec. 14-1317 *supra*

(Appendix A), but without specifying any constitutional provisions, state or federal, that it offends.

The prayer is not a part of the essential petition under Nebraska decisions. It tenders no issue, and neither adds to nor takes from the evidence required. *Standard Reliance Insurance Co. v. Ruth Schoenthal,* 171 Neb. 490, 106 N. W. 2d 704.

A demurrer lies to the statement of facts in the petition constituting the supposed cause of action, not to the prayer for relief, which may be much in excess of what those facts warrant the Court to grant. *Reid v. City of Omaha,* 150 Neb. 286, 34 N. W. 2d 375.

The Supreme Court of Nebraska did not pass upon the constitutionality of this or any other statute, but only upon the validity of the tax. (See opinion appellants' Appendix A.)

Therefore, no substantial Federal question is presented for this appeal under 28 U. S. C. A., Sec. 1257. *Rohr Aircraft Corp. v. San Diego County,* 362 U. S. 628, 80 S. Ct. 1050, 4 L. Ed. 2nd 1002; *Charleston Federal Savings & Loan Ass'n. v. Alderson,* 324 U. S. 182, 65 S. Ct. 624, 89 L. Ed. 857; *Jett Bros. Co. v. City of Carrollton,* 252 U. S. 1, 40 S. Ct. 255, 64 L. Ed. 421.

There is no Substantial Federal Question Presented Invoking any Method of Review by this Court.

The statute authorizing the two mill levy when approved by the voters (Sec. 14-1317, supra), and the statute authorizing annexation (Sec. 14-117, R. S. of Neb., 1943, Reissue 1963, Appendix H, post, page 17) are both silent as to any exemption from taxation for the University,

of property annexed to the City subsequent to such vote. Therefore, the voter authorization extends to the annexed property of appellants, within *Hustead v. Village of Phillips*, 131 Neb. 303, 267 N. W. 919, 921, holding:

> "* * * When the act or statute authorizing a change of boundaries is silent as to apportionment of municipal debts, the territory embraced within the new boundaries becomes liable for all prior debts, * * *."

Appellants' sole ground for the claim of a substantial Federal question is that they do not have the privilege of voting for candidates for the Board of Education of the School District of Omaha, which Board, pursuant to statutory authority, appoints the Board of Regents of the Municipal University. This Board is an entirely separate entity (14-1308, supra Appendix G, post, page 17).

Appellants' complaint results from the passage by the Legislature of Nebraska of a proviso to Section 79-1002, R. S. of Neb., 1943, 1961 Cum. Supp. (shown at Appendix I, post, page 18). By this proviso territory of another high school district annexed to the City of Omaha does not become a part of the School District of Omaha *ipso facto* as before, but remains a part of the original district, unless and until it votes in favor of merging with the Omaha school district. It is this proviso, passed by a legislature in which appellants were represented, that leaves them in School District No. 66 rather than placing them in the Omaha District. It was passed for the obvious benefit of District No. 66. Its effect on this remote and indirect control of the University by appellants was merely coincidental. They still have adequate voting rights relating to the University.

The action of the Legislature in passing these statutes was not an arbitrary or capricious exercise of plenary power to fix the boundaries of governmental subdivisions as in the cases cited by appellants; nor is any right, title, privilege or immunity of appellants infringed.

Appellants' contention, based upon the maxim of taxation without representation, is fully met by this Court's decision in *Thomas v. Gay*, 169 U. S. 264, 18 S. Ct. 340, 42 L. Ed. 740, where complainants, nonresidents of the Territory of Oklahoma, were taxed upon cattle owned by them and grazing upon Indian reservations annexed for judicial purposes. The holding was:

> "Undoubtedly there are general principles, familiar to our systems of state and Federal government, that the people who pay taxes imposed by laws are entitled to have a vote in the election of those who pass the laws, and that taxes must be assessed and collected for public purposes, and that the duty or obligation to pay taxes by the individual is founded in his participation in the benefits arising from their expenditure. But these principles, as practically administered, do not mean that no person, man, woman, or child, resident or nonresident, shall be taxed unless he was represented by someone for whom he had actually voted, nor do they mean that no man's property can be taxed unless some benefit to him personally can be pointed out. Thus it has been held that personal allegiance has no necessary connection with the right of taxation; an alien may be taxed as well as a citizen. Mager v. Grima, 49 U. S. 8 How. 494 (12:1170); Witherspoon v. Duncan, 71 U. S. 4 Wall. 210 (18:339). So, likewise, it is settled law that the property, both real and personal, of nonresidents may be lawfully subjected to the tax laws of the state in which they are situated."

In *Loughborough v. Blake*, 5 Wheat. 317, this Court said:

> "• • • Representation is not made the foundation of taxation. • • •
>
> "• • • Although, in theory, it might be more congenial to the spirit of our institutions, to admit a representative from the district, it may be doubted, whether, in fact, its interests would be rendered thereby the more secure; and certainly, the constitution does not consider their want of a representative in congress as exempting it from equal taxation.
>
> "If it were true, that, according to the spirit of our constitution, the power of taxation must be limited by the right of representation, whence is derived the right to lay and collect duties, imposts and excises, within this district? If the principles of liberty, and of our constitution, forbid the raising of revenue from those who are not represented, do not these principles forbid the raising it by duties, imposts, and excises, as well as by a direct tax? • • •"

The Supreme Court of Nebraska correctly held that the maxim of taxation without representation was satisfied by representation in the legislature and that the method of selecting the Regents, as administrative officers of the university, did not render void the tax voted by the electors of the City.

The burden is on appellants to establish the unconstitutionality of the tax that they assert.

The above is sustained by the holdings of this Court in *Charleston Federal Savings and Loan Ass'n. of Alderson*, supra (ante, p. 5, and cases there cited, page 191 of 324 U. S.).

The Court's Policy of "Strict Necessity" Applies.

It is elementary law that the Supreme Court of the United States follows a policy of strict necessity in disposing of constitutional issues raised for review of a state court judgment. *Rescue Army v. Municipal Court of Los Angeles*, 331 U. S. 549, 67 S. Ct. 1409, 91 L. Ed. 1666. The judicial code (237A) restricts obligatory appellate jurisdiction to a narrow class of cases and forecloses an appeal as of right where there is merely an attack upon a tax assessment or levy. *Memphis National Gas Co. v. Beeler*, 315 U. S. 649, 62 S. Ct. 857, 86 L. Ed. 1090.

This case does not involve the validity of any statute. Furthermore the state court properly held that the levy of the tax did not violate any provision of the Federal Constitution.

For the foregoing reasons it is respectfully submitted that the motion of the named appellees to dismiss, or in the alternative, to affirm, should be sustained.

Respectfully submitted.

Name /s/ William R. King

Address 620 First Natl. Bk., Omaha, Nebraska

Name /s/ Seymour L. Smith

Address 720 Keeline Bldg., Omaha, Nebraska

Members of the Bar of this Court
Attorneys for named appellees.

APPENDIX "A"

Section 14-1317, R. S. of Neb., 1943, Reissue 1962.

"14-1317. Municipal university; tax; limitations; method of increase; power to borrow. (1) The board of regents shall, in the month of July of each year, certify a tax for the support of such municipal university, including the purchase of lands and construction of buildings, the purchase of equipment, and the repairs of the buildings and equipment of such municipal university, and including such amount as shall be necessary for the annual operation of the university for the fiscal year commencing on the first day of January following, not exceeding in any one year one mill on the dollar upon the assessed value of all the taxable property in such city, except intangible property, which levy the president and secretary of such board of regents shall, on or before July 31, certify to the city council, which is hereby authorized and required to cause the same to be levied and to be collected by the treasurer of the city as are other taxes, and paid over by him to the treasurer of such board of regents, subject to the order of said board of regents. If in any year the amount so certified and collected is not needed for the purposes of such university, the balance shall be credited to the sinking fund of such university to be used for additional buildings or other necessary permanent equipment; Provided, that the maximum mill levy may be increased from one mill to not to exceed two mills on the dollar of the assessed value of all the above described property within such city, except intangible property, by a vote of the qualified electors of such city, as provided for by subsection (2) of this section, at any general state or city election, or at a special election called for that purpose; and provided further, that where the qualified electors of such city at any general state or city election have by a majority of those voting in the election voted in favor of increasing such maximum mill levy to two mills on the dollar

upon the assessed value of all the taxable property in such city, except intangible property, and when in any year such total assessed valuation of such city is less than the total valuation used as the basis for taxation in such city in 1952, the board of regents may fix a levy sufficient to produce as much total revenue as was produced by the 1952 levy.

"(2) Notice of the time and place of holding the election, provided for by subsection (1) of this section, shall be given once each week for three successive weeks, the first notice to be given at least thirty days prior to the election in at least one newspaper of general circulation printed and published within such city. The proposition to increase the maximum mill levy may be submitted to the qualified electors upon the affirmative vote of two-thirds of the members of the board of regents, and shall state the maximum mill levy which it proposes to levy annually. If a majority of those voting at the election on the proposition vote in favor of such increased maximum mill levy, then such fact shall be certified to the city council and thereafter the city council shall annually cause to be levied, according to law, such tax as may be certified by the board of regents, but not exceeding the mill levy so voted."

APPENDIX "B"

CERTIFICATION

I, Jerry Hassett, the duly appointed, qualified, and acting Election Commissioner of Douglas County, Nebraska, hereby certify, as follows:

The records in my office show that on May 15, 1951, the following proposition was duly submitted to the qualified electors of the City of Omaha, Nebraska, at a special election, to-wit:

" INCREASE MAXIMUM LEVY FOR UNIVERSITY OF OMAHA

INCREASE IN MAXIMUM AUTHORIZED LEVY FOR THE UNIVERSITY OF OMAHA FROM ONE MILL TO TWO MILLS.

"Shall the maximum annual levy of not to exceed one mill on the dollar of valuation of all personal, mixed and real property within the City of Omaha, which is taxable according to the laws of the State of Nebraska, which levy the Board of Regents of the Municipal University of Omaha is authorized to certify annually to the City Council of the City of Omaha, the same to be levied, and collected by the treasurer of the City and paid over by him to the treasurer of the board of regents, for the support of the University, including the purchase of lands and construction of buildings, the purchase of equipment, and repairs of the building, and equipment of the University, and including such amount as shall be necessary for the annual operation of the University for the fiscal year commencing on the first day of January following, be increased to not to exceed two mills on the dollar of assessed valuation of such taxable property."

YES

NO "

I further certify that the result of such election was, Yes 27,083 : No 25,159

Dated this 18th day of October, 1963.

(Election Commissioner
OFFICIAL SEAL
Douglas County, Nebraska)

/s/ JERRY HASSETT
Election Commissioner
Douglas County, Nebraska

APPENDIX "C"

Section 14-201, R. S. of Neb., 1943, Reissue 1962.

"14-201. City Council members; election; term. In any city of the metropolitan class there shall be elected at large the following officers and none other; Seven Councilmen, whose terms of office shall be three years, who shall constitute the council of said city. The regular or general election for the election of all elective officers of cities of the metropolitan class shall be held on the first Tuesday after the Second Monday in May and every three years thereafter. The term of office of such councilmen shall commence on the second Tuesday after such election."

APPENDIX "D"

Section 14-551, R. S. of Neb., 1943, Reissue 1962.

"14-551. City treasurer; county treasurer is ex officio; bond, amount. The county treasurer of the county in which the metropolitan city is located shall be ex officio city treasurer of such city. As such treasurer of the city, he shall give bond in such amount as may be required of him by the city council, in no event to be less than two hundred thousand dollars conditioned for the faithful discharge of his duties as city treasurer. Such bond shall be signed by at least one surety or guaranty company, to be approved by the city council, and the cost thereof shall be paid by the city. Such bond may be enlarged at any time the city council may deem an enlargement or additional bond necessary. Additional bond shall be likewise signed by a surety company to be approved by the city council, and costs thereof shall be paid by the city."

APPENDIX "E"

Section 14-1318, R. S. of Neb., 1943, Reissue 1962.

"14-1318. Municipal university; treasurer; duties; bond. The treasurer of the county in which said metropolitan city is located shall be ex officio treasurer of the board of regents. He shall prepare and submit to the board, in writing, a monthly report of the state of its finances, receive and receipt for the money collected by the employees of the board, and pay out the same and all other funds of the board only on warrant signed as the board of regents shall by resolution direct. The ex officio treasurer shall give a surety bond payable to the board of regents for the faithful performance of his duties in such amount as the board may deem necessary; the bond to be approved by the board, and the premium thereof paid by the municipal university. Such county shall receive as full compensation for the collection and disbursement of the funds of the municipal university and its board of regents the sum of two thousand dollars per annum, to be paid quarterly by the municipal university; Provided, further that the county treasurer shall receive no additional compensation for the administration of the funds of the municipal university."

APPENDIX "F"

Section 32-308, R. S. of Neb., 1943, Reissue 1960.

"32-308. County officers; when elected. In each county, except as provided in this section, there shall be elected at the general election in 1952 and every fourth year thereafter one county judge; in the year 1954 and every fourth year thereafter, one sheriff, one county treasurer, one county clerk, one county surveyor, one county attorney, and one county superintendent of public instruction, for the term of four years. In each county having a population in excess of two hundred thousand inhabitants, at the general election in the year 1952 and every four years thereafter a register of deeds and a county clerk shall be elected for a term of four years. In each county having a population of more than sixteen thousand five

hundred inhabitants and not more than two hundred thousand inhabitants, to be ascertained by the census of 1950, at the general election in the year 1954 and every four years thereafter a register of deeds shall be elected for a term of four years."

APPENDIX "G"

Section 14-1308, R. S. of Neb., 1943, Reissue 1962.

"14-1308. Board of regents; powers, rules and regulations; tuition. The board of regents so constituted shall have power to prescribe such rules, by-laws, and regulations as may be most expedient for the board and for the government of the municipal university, its faculty, instructors, other empolyees and all students attending the university, subject to the existing laws of the state and of the United States. The board of regents shall also have power to fix reasonable tuition and other charges to be paid by students attending the university, and may, in its discretion, make additional charges to students who are not residents of such city."

APPENDIX "H"

Section 14-117, R. S. of Neb., 1943, Reissue 1962.

"14-117. Corporate limits; how fixed; annexation of cities or villages; limitation; powers and duties of city council. The corporate limits of any city of the metropolitan class shall be fixed and determined by the council of such city by ordinance. The city council of any metropolitan city may at any time extend the corporate limits of such city over any lands, lots, tracts, street or highway, such distance as may be deemed proper in any direction, and may include, annex, merge or consolidate with such metropolitan city, by such extension of its limits, any adjoining city of the first class having less than 10,000 population or any adjoining city of the second class or village; Provided, that any other laws and limitations defining the boundaries of cities or villages or

the increase of area or extension of limits thereof, shall not apply to lots, lands, cities or villages annexed, consolidated or merged under this section. This grant of power shall not be construed as conferring power upon the council to extend the limits of a metropolitan city over any agricultural lands which are rural in character."

APPENDIX "I"

Section 79-1002, R. S. of Neb., 1943, Cum. Supp. 1961.

"79-1002. Property subject to school tax; management of affairs of district; independent district; merger; procedure. All property within the corporate limits of metropolitan cities, except such property as now is or may hereafter be exempt by law, shall be subject to taxation for all school purposes. The affairs of the school district created by Chapter 79 shall be conducted exclusively by the board of education except as otherwise provided by Chapter 79; *Provided*, that any school district in an unincorporated area which maintains a high school *shall, when its area or any part thereof is incorporated into a metropolitan city, remain as a separate and independent district* unless a majority of the legal voters of that district voting on the question vote in favor of merging with such metropolitan school district. Whenever a petition signed by twenty-five per cent of the legal voters in such independent district shall be presented to the board of education of such district requesting that a vote be taken for or against such merger, an election shall be called by the board for that purpose within a reasonable time thereafter which in any event shall exceed six months upon a notice given by the officers of such independent district at least twenty days prior to such election. Such election shall be conducted by the election commissioner of the county and results thereof canvassed and certified by him to the boards of education of the respective districts involved in said merger. In the event that a majority

of the legal voters in such district voting on the question vote in favor of merging with the metropolitan district, the merger shall become effective upon an affirmative vote of a majority of the members of the board of education of the metropolitan school district; Provided, that if a majority of the members of the board of education of the metropolitan school district do not vote in favor of the merger within ninety days after such election, the merger shall not become effective." (Italics supplied.)